

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE L. WILSON,

Defendant-Appellant.

UNPUBLISHED

August 19, 2004

No. 246893

Wayne Circuit Court

LC No. 02-006848

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant to mandatory life imprisonment for the first-degree murder conviction, three to thirty years' imprisonment for the felon in possession of a firearm conviction, and five consecutive years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts and Procedure

On July 5, 2000, Edward Burton drove Cornelius Terry Moore to the home of Fred Jones and Gail Wilson, who was defendant's mother and codefendant at trial. When Burton and Moore arrived at the house, Burton stopped the car on the street at the side of the house and sounded the car horn to summon Jones. Defendant emerged from behind the house, appearing agitated and yelling profanities at Burton for blowing the horn in front of his mother's house. Burton and defendant argued, and defendant walked up to the driver's side of the car and punched Burton in the face. Burton pulled into the driveway of the home, striking Gail Wilson's parked vehicle. Defendant picked up a cinderblock and threw it at Burton's front windshield, breaking the glass. When defendant approached the passenger side door of the car, Moore grabbed him. Defendant told his mother, who was now standing outside the house, to "get the gun." Gail Wilson ran into the house and emerged seconds later with a gun. Moore observed Gail Wilson holding the gun outstretched toward defendant. Burton backed up his car and drove away. Defendant then got into a small red car and drove away in the opposite direction.

After having driven only a few blocks, Moore saw a small red car following them. Burton unsuccessfully attempted to evade the red car and eventually pulled into an alley. Egress

from the alley was blocked by a parked van. Moore got out of the car. While Burton was attempting to turn his car around, defendant entered the alley on foot carrying a gun. Moore ran away, but heard gunshots from the alley. Following the shots, a witness saw defendant run out of the alley, throw something into the backseat of the red car, and drive away quickly. Soon after, Moore returned to the alley and found Burton in the driver's seat of the car with a fatal bullet wound in his head.

II. Analysis

A. Defense Counsel's Outside Contact With Jurors

Defendant argues that the trial court erred in denying his motion for a mistrial. He argues that comments from an excused juror regarding what the juror overheard a defense attorney say might have tainted the remainder of the jury and denied defendant a fair trial and impartial jury. A trial court's decision to grant or deny a motion for a mistrial will not be reversed absent an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). A mistrial should be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Where there is outside contact between a juror and an attorney for one of the parties, reversal is not required unless the defendant can demonstrate that some prejudice occurred from the contact. *People v Schram*, 378 Mich 145, 159-160; 142 NW2d 662 (1966). A mere possibility of prejudice is insufficient. *Id.* at 159.

Here, two jurors heard one of the defense attorneys in an elevator commenting on the difficulty of the case and the amount of evidence being presented against defendant. The jurors heard the defense attorney say that he was going to try, but "it didn't look good." One of these jurors told another juror that they "heard something that we shouldn't have heard," but did not elaborate on this statement. The trial court excused the two jurors who heard the defense attorney's remarks. There is no indication that the remaining jurors were prejudiced by the remark made by the excused juror. Because the comment made by the excused juror was vague and did not reveal the substance of the defense attorney's remarks, and because defendant failed to show any prejudice from the comment, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

B. Prosecutorial Misconduct

Next, defendant alleges two instances of prosecutorial misconduct during closing argument.

1. Presumption of Innocence

Defendant first claims that the prosecutor improperly shifted the burden of proof by suggesting that defendant had the obligation to present a defense and failed to do so. This issue is reviewed de novo to determine whether defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

During closing argument, the prosecutor noted that Burton's murder was not justified and that defendant did not contend that the murder was done in self-defense or in the defense of others. A prosecutor may argue the evidence presented and all reasonable inferences arising from it as they relate to his particular theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The prosecutor's comment stressed his theory of the case that the killing of Burton was an unjustified premeditated murder. While the prosecutor's comments highlighted the weaknesses of the asserted defense and the absence of justification in the shooting, the statement does not suggest that defendant had to prove that he was not guilty. The trial court properly instructed the jury that the prosecution had the burden to prove defendant's guilt beyond a reasonable doubt and that the statements and arguments of the attorneys were not evidence. The prosecutor's argument that the murder was not justified did not deny defendant a fair trial by suggesting that defendant had the burden to prove his innocence, but was merely a proper attempt by the prosecutor to emphasize the weaknesses of the defense.

2. Juror Sympathy

Defendant also contends that the prosecutor improperly attempted to elicit sympathy for the victim by asking the jury to imagine the last moments of the Burton's life and by creating the picture of Burton being "hunted down like an animal." This claim of prosecutorial misconduct was not preserved for appeal, so it is reviewed for plain error affecting defendant's substantial rights. *McLaughlin, supra* at 645. It is improper for a prosecutor to appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). "Nevertheless, prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms. Emotional language may be used during closing argument and is 'an important weapon in counsel's forensic arsenal.'" *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996) (citations omitted). Moreover, the trial court instructed the jury not to let sympathy or prejudice influence its decision. Under these circumstances, defendant was not prejudiced by the prosecutor's remarks, and reversal is not warranted.

C. Evidentiary Issues

The trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). When the underlying decision involves preliminary questions of law, such as whether a rule of evidence precludes admission, the question is reviewed de novo. *Id.*

1. Bad Acts Evidence

Defendant argues that the trial court abused its discretion in admitting evidence that he shot and wounded three people and shot and killed Moore's daughter on September 17, 2000.¹ The evidence was admitted under MRE 404(b)(1), which provides:

¹ In a separate trial regarding the events of September 17, 2000, a jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to
(continued...)

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For “bad acts” evidence to be admissible, the following factors must be present: (1) the prosecutor must offer the evidence under something other than a character or propensity theory; (2) the evidence must be relevant under MRE 402; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.² *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant contends that evidence of the events of September 17, 2000, should not have been admitted under MRE 404(b), because they were not relevant to this case, as identity “was not a major issue as far as the prosecution was concerned,” and because the prejudice from the admission of the evidence substantially outweighed its probative value. We disagree. The prosecution offered the disputed evidence for the proper purpose of proving defendant’s identity and to show his consciousness of guilt.

The disputed evidence showed that, in early September 2000, defendant approached a resident of the house where Moore lived on Acacia Street, and asked her if Moore lived there. When the woman asked defendant to identify himself, defendant responded, “[J]ust tell him I’ll be back.” On September 17, 2000, defendant and an unidentified woman forced their way into the Acacia Street house, where defendant struggled with and shot three people in the house and fatally shot Moore’s sixteen-year-old daughter in the head while she was sleeping in her bed. During the incident, defendant was apparently looking for someone, as he kept repeating, “Where is he at?” Defendant never encountered Moore, who was in bed in the basement.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. We disagree with defendant’s suggestion that identity was not a major issue in the case; in fact, at trial, defendant framed identification as the *only* major issue in the case.³ The evidence of the Acacia Street house shootings served to rebut defendant’s

(...continued)

commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. These convictions are the subject of defendant’s appeal in Court of Appeals Docket No. 247211.

² “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MCR 403.

³ In his closing arguments, defense counsel stated as follows: “[T]here is one main issue that you’re going to have to decide. . . . The issue is[]: D[id] the prosecutor prove that Mr. Wilson is the shooter on July 5 of Edward Burton . . . []?”

theory that he was mistakenly identified as Burton's killer and demonstrated defendant's consciousness of guilt. By presenting evidence that defendant shot several people during an attempt to find and kill Moore, who was the only witness who both saw defendant with a gun at the scene of the murder and could identify defendant as the perpetrator, the prosecution supported its theory that defendant was correctly identified as the person who murdered Burton. Therefore, the evidence was introduced for a proper purpose and was relevant.

Additionally, the trial court did not err in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. The evidence of the Acacia Street house shootings was extremely damaging to defendant's case, given the cold-blooded nature of the shootings and the execution-style killing of a sleeping sixteen-year-old girl. However, "[t]he fact that evidence is damaging and harms the opposing party does not indicate that it is unfairly prejudicial." *Chmielewski v Xermac, Inc.*, 216 Mich App 707, 710; 550 NW2d 797 (1996), *aff'd* 457 Mich 593; 580 NW2d 817 (1998). All evidence presented by the prosecution is "prejudicial" against the defendant to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), *mod* 450 Mich 1212 (1995). But "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Evidence of the Acacia Street house shootings was not marginally probative, as it was relevant to show identification, and identification was the most important issue at defendant's trial. Furthermore, the trial court attempted to minimize any prejudice by instructing the jury that it should only consider the evidence of the Acacia Street house shootings to determine the identity of the people who committed the crimes and not to show that defendant murdered Burton because he is a bad person, is likely to commit other crimes, or is guilty of other bad conduct. Juries are generally presumed to follow their instructions. *People v Rogers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). Therefore, we conclude that the trial court did not abuse its discretion in determining that the evidence was admissible, as the probative value of the evidence was not outweighed by the danger of unfair prejudice.

2. Evidence of Flight

Next, defendant argues that the trial court abused its discretion in admitting evidence related to defendant's flight from Michigan after the crime. Evidence of flight is admissible to show consciousness of guilt. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). The term "flight" has been applied to the act of leaving the jurisdiction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), citing 29 Am Jur 2d, Evidence, § 532, p 608. In *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993), this Court held that evidence that the defendant fled to Florida after committing the crime was admissible.

Defendant argues that evidence that he was apprehended in Iowa was inadmissible, because there was no evidence that his trip constituted "flight," or that he left Michigan in an effort to escape from the police or conceal his whereabouts. Defendant further argues that neither evidence that law enforcement obtained a "flight warrant" for defendant's arrest, evidence that defendant was featured as a fugitive on a national television broadcast, nor

evidence that defendant was temporarily detained in Indiana for “some other situation,”⁴ were relevant in the absence of proof that defendant fled law enforcement. We disagree. Regardless whether defendant’s flight from Michigan was an innocent trip to visit relatives or a flight from the jurisdiction or the police, there is no dispute that defendant left Michigan. “It is true that ‘flight from the scene of a tragedy may be as consistent with innocence as with guilt;’ but it is always for the jury to say whether it is under such circumstances as to evidence guilt.” *Cutchall, supra* at 398, quoting *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927). Here, as the trial court instructed the jury, it was the jury’s duty to determine whether defendant’s flight from Michigan was for innocent reasons or because she had a guilty state of mind. Evidence that there was a “flight warrant” for defendant’s arrest, that defendant was featured as a fugitive on a nationally-televised show, and that defendant was temporarily detained and then released in Indiana before law enforcement apprehended him for murder, outline the circumstances that led to defendant’s arrest in Iowa and help to prove that defendant would have known that he was wanted by law enforcement for Burton’s murder. Therefore, this evidence is relevant to show that defendant was fleeing because he was conscious of his guilt. Defendant’s argument that he was not hiding and did not leave Michigan to flee from police does not affect the admissibility of this evidence, but relates to the weight and credibility of the evidence, which is a question of fact for the jury.

We further disagree with defendant that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. The circumstantial nature of flight evidence does not render the evidence inadmissible under MRE 403. *Cutchall, supra* at 401. Evidence of defendant’s flight “becomes part of a seamless web of evidence that a rational trier of fact could employ to find the elements of the crime proven beyond a reasonable doubt.” *Id.* Additionally, there is no indication that the jury gave too much weight to the evidence of defendant’s flight, as there were many facts elicited at trial that proved defendant’s guilt beyond a reasonable doubt. See *id.*

3. Photograph Evidence

Next, defendant contends that the trial court abused its discretion in admitting a 1989 photograph of him, depicting his appearance with short hair, as it was irrelevant and unfairly prejudicial. The contested photograph was submitted solely for the purpose of demonstrating defendant’s appearance with short hair. We conclude that, even if the photograph was improperly admitted, defendant has not shown that it is more probable than not that the outcome of the trial would have been different absent the admission of the photograph. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The testimony of Moore, Jones, and other witnesses who were present in the area of the shooting provided strong independent evidence of defendant’s guilt. Evidence that defendant later forced his way into Moore’s home and shot four people in an effort to get to Moore further supported defendant’s identity as the shooter. Additionally, any prejudice to defendant by the admission of the photograph was mitigated when defendant cross-examined a witness regarding the age of the photograph, so the jury could

⁴ There was no testimony regarding why defendant was detained in Indiana or who detained him.

consider this fact in weighing the evidence. Therefore, any error in admitting the photograph of defendant was harmless.

4. Hearsay Evidence

Finally, defendant argues that the trial court abused its discretion in admitting, under the excited utterance exception to the hearsay rule, MRE 803(2), police officer testimony regarding Moore's statements at the crime scene. The prosecution does not dispute that Moore's statement to police was hearsay. However, "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible under the excited utterance exception to the hearsay rule, MRE 803(2). There are two primary requirements for excited utterances: (1) that there is a startling event, and (2) that the resulting statement is made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection. . . .

Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. It is necessary to consider whether there was a plausible explanation for the delay. [*Id.* at 551.]

Here, Moore made the statements to the police officers shortly after he had witnessed defendant punch Burton in the face, throw a cinderblock at his windshield, obtain a gun, chase Moore and Burton until he trapped them in an alley, and finally shoot Burton in the head. Defendant does not dispute that these were startling events. But defendant argues that Moore's statements were made in response to the officers' questioning and were in the form of a long and detailed narrative, evidencing reflective thought. Whether a statement made in response to questioning should be admitted under MRE 803(2) depends on the circumstances of the question and whether it appears that the statement was the result of reflective thought. *Smith, supra* at 553. Here, the evidence shows that Moore was still under the stress of the events when he spoke to the police. The officers testified that when Moore made the statements, he "was running all over the place, jumping around." They also described him as "really worked up, nervous, excited," "hysterical," "bouncing around," "very nervous," and "scared." There is no indication that Moore's statement to the officer was the result of a persistent, insistent, or suggestive line of questioning. See *Smith, supra* at 553. "The trial court's determination whether the declarant was

still under the stress of the event is given wide discretion.” *Smith, supra* at 552. We conclude that the trial court did not abuse its discretion in admitting the statements under MRE 803(2).⁵

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

⁵ Because the trial court did not abuse its discretion in admitting Moore’s statements to police, we reject defendant’s argument that the prosecution engaged in misconduct by seeking the admission of this evidence. See *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003) (“The prosecutor’s good-faith effort to admit evidence does not constitute misconduct”).